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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92046037
Party	Plaintiff Bryan Corporation Bryan Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,093,389
Registered May 16, 2006

BRYAN CORPORATION, Petitioner, v. NOVATECH SA, Registrant.	)	Cancellation No. 92046037

PETITIONER BRYAN CORPORATION'S
REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS

Bryan Corporation ("Bryan") respectfully submits this reply brief in support of its motion for sanctions. The Board's October 14, 2008 Order ("Order") required Novatech to provide a full and complete response to Interrogatory No. 5, which Novatech did not do. Although Novatech provided a "yes" response to this interrogatory, the answer is of no evidentiary value as it is not under oath as Federal Rule 33 requires. The Board should flatly reject Novatech's claim that this is an adequate discovery response. With this response, Novatech has crossed the line from dilatory discovery gamesmanship to defiance of a specific Board order. The only appropriate sanction here is entry of judgment.

By now, Novatech should be well aware of Board discovery rules. In particular, and among other things, it should know that Federal Rule of Civil Procedure 33 requires that responses to interrogatories be given under oath separately signed by the party making the response. Fed. R. Civ. P. 33(b). It should also know that federal law expressly requires that documents that are to be made under oath must be sworn before a proper official such as a notary

or contain specific language subjecting the declarant to penalties of perjury. Novatech's verification contains neither.

The only way Novatech could legitimately submit an unsworn interrogatory response is under the following federal statute, which dictates the requirements of unsworn declarations as follows:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true *under penalty of perjury*, and dated, in substantially the following form:
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> ***
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)."

28 U.S.C. § 1746. Novatech did not subject itself to penalties of perjury by satisfying these requirements in its discovery response. Furthermore, in light of the clear requirements of this statute, Novatech has no legitimate basis not to know how to satisfy Rule 33's requirements to answer under oath. *See* Opposition at 5. Novatech's failure to observe such simple and straightforward requirements as those set forth above is inexcusable.

Novatech's failure to comply with the law by not swearing its verification before a notary or including the appropriate statutory language for an unsworn declaration makes its verification invalid and its response to Interrogatory No. 8 noncompliant. *See Hardison v. Balboa Ins. Co.*, 4

Fed. Appx. 663, 669 n.5, 2001 U.S. App. LEXIS 2409 (10th Cir. 2001) (implying that un-notorized verification was not valid); *Roy v. Johnson*, 97 F. Supp. 2d 1102, 1106 (N.D. Ga. 2000) (unsworn affidavit did not satisfy rule for opposing summary judgment). The Board therefore should easily reject Novatech's representation that it complied with the Board's Order.

Furthermore, contrary to Novatech's claim, the issues with Novatech's verification were not "manufactured." The Federal Rules of Civil Procedure are rules with which a litigant must comply. It is not for Novatech to decide for itself whether to comply with these rules or not. Nor is Bryan in a position to waive their requirements.[1]

Novatech's failure to properly verify its prior interrogatory responses is no justification for its noncompliance this time around. The purpose of the verification is to insure that the statements being verified are made by an individual with personal knowledge of the relevant facts and that the statements are true and reliable. Without this verification, an interrogatory response like Novatech's is useless, as the truth of the representation has not been affirmed, and the response therefore cannot be used as summary judgment evidence or evidence for trial. And as explained in Bryan's opening brief, the subject of this particular interrogatory goes to the heart of the fraud claim. The prejudice to Bryan in this situation is therefore manifest.

Novatech has not provided a satisfactory explanation as to why its response to Interrogatory No. 5 was not under oath. If Novatech truly intended to comply with Rule 33 and the Board's Order, Novatech easily could have supplemented its response with the proper verification, but Novatech elected not to do so, even in responding to Bryan's santions motion.

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[1] Novatech cites TBMP §707.04 for the proposition that Bryan has waived its right to object to Novatech's verification. This provision, however, concerns waiver at trial, and is inapplicable to discovery disputes such as this one. This is just another example of Novatech misapplying Board authority.

Given Novatech's recalcitrance, no amount of additional conferencing or correspondence between the parties would have resolved this issue.

While Novatech claims that TBMP 523.02 requires from Bryan a "written statement" that it applied "good faith efforts" to resolve the issue, this provision relates to motions to compel, not sanctions. As Novatech is aware, the Board invited Bryan to bring this motion, and nothing more on Bryan's part was required. Here again, Novatech misapplies Board regulations to support an indefensible argument.

The Board has shown extreme patience with Novatech, affording it a number of opportunities to bring its response to Interrogatory No. 5 in line. Novatech has defied the Board's instructions now on two separate occasions. This type of defiance or "willful evasion" of an order is precisely the type of conduct sanctionable by an entry of judgment. *See* TBMP 527.01; *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000) (repeated failure to comply with orders and unpersuasive reasons for delay resulted in entry of judgment); *Baron Philippe de Rothchild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1854 (TTAB 2000) (pattern of dilatory conduct indicated willful disregard of Board order and resulted in entry of judgment) *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984) and *Unicut Corp. v. Unicut, Inc.*, 220 USPQ 1013 (TTAB 1983) (in 1983 decision respondent sanctioned by order to produce documents by mailing them to petitioner's attorney at petitioner's expense; in 1984 decision respondent's continued refusal to obey Board orders sanctioned by entry of judgment); and *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 USPQ 99 (TTAB 1976) (judgment entered where applicant provided no reason for not complying with Board order compelling discovery).

By supplying an improperly verified interrogatory response Novatech has clearly evaded the Board's Order. Accordingly, for the foregoing reasons, and the reasons set forth in Bryan's opening brief, Bryan respectfully requests that the Board grant the motion for sanctions by entering judgment against Novatech on Bryan's fraud claim.

Respectfully submitted,

Dated: November 24, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2008, a copy of the foregoing Reply in Support of Bryan's Motion for Sanctions was served by first class mail, postage prepaid, upon:

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